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MAKING SENSE OF ABORIGINAL AND TREATY RIGHTS

Brian Slattery*
Toronto

This paper proposes a basic framework for understanding the decisions of the Supreme Court of Canada relating to aboriginal and treaty rights. It argues that the foundations of these rights lie in the common law doctrine of aboriginal rights, which originated in ancient custom generated by historical relations between the Crown and indigenous peoples, as informed by basic principles of justice. This sui generis doctrine is part of the common law of Canada and operates uniformly across the country; it also provides the context for interpreting section 35(1) of the Constitution Act, 1982. The doctrine of aboriginal rights has a number of distinct branches. One branch governs treaties between indigenous peoples and the Crown, and determines their basic status, existence, interpretation and effects. Another branch deals with the various types of aboriginal rights, including aboriginal title and the right of self-government. Here, the doctrine distinguishes between generic and specific rights, exclusive and non-exclusive rights, and depletable and non-depletable rights. Still other branches of the doctrine articulate the principles governing the operation of aboriginal customary law and the fiduciary role of the Crown.

Cet article propose un cadre de référence pour comprendre les décisions de la Cour suprême du Canada touchant les droits autochtones et les droits résultant de traités. L'auteur y soutient que les fondements de ces droits reposent dans la doctrine de droit commun sur les droits autochtones. Cette doctrine tire son origine de l'ancienne coutume qui est née des rapports historiques entre la Couronne et les peuples indigènes et qui a été influencée par les principes fondamentaux de justice. Cette doctrine sui generis fait partie du droit commun canadien et s'applique uniformément à travers le pays; elle sert aussi de contexte pour l'interprétation de l'article 35, paragraphe un de l'Acte constitutionnel de 1982. La doctrine des droits autochtones comporte un certain nombre de branches. L'une d'elles régit les traités entre la Couronne et les peuples indigènes; elle en détermine le statut de base, l'existence, l'interprétation et les effets. Une autre branche concerne les divers types de droits autochtones, incluant le titre autochtone et le droit à l'autonomie gouvernementale. En cela, la doctrine distingue les droits généraux et particuliers, les droits exclusifs et non exclusifs, les droits susceptibles d'être épuisés et ceux qui ne le peuvent pas. D'autres branches de la doctrine établissent les principes qui gouvernent l'application du droit coutumier autochtone et le rôle de fiduciaire de la Couronne.

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I. Introduction

Over the past thirty years, the Supreme Court of Canada has begun remapping the neglected territory of aboriginal and treaty rights. It has done so piecemeal, in a series of important decisions extending from *Calder*¹ in 1973 to the recent *Marshall* case.² When it started, the Court had little to go on. The results of previous forays into this territory had been uncertain at best and misleading at worst. The leading authority on the subject, the Privy Council decision in *St. Catherine's Milling and Lumber Company*,³ was replete with dubious assumptions and obscure terminology. In effect, the Supreme Court inherited a sketch map of shadowy coasts and fabulous isles, with monsters at every turn.

Let it be said that the Supreme Court has fared well in its initial ventures. Little-known areas have been brought to light and apocryphal seas dispelled. We now know broadly what is *terra firma* and what is not, and the monsters have been largely tamed or banished to the decorative margins. Nevertheless, the first fruits of the Court's labours amount to a series of explorer's charts, enlightening so far as they go, but covering different areas, drawn in varying projections, and sometimes bearing an uncertain relation to one another. We lack a reliable *mappamundi*. The purpose of this paper is to attempt such a map — one that surveys the subject as a whole and displays the various parts in their proper dimensions and inter-relationships.

We start with the common law doctrine of aboriginal rights and examine its two major sources: ancient custom and basic principles of justice. We then consider treaties between indigenous peoples and the Crown and discuss their status and effects. We conclude with a review of the various types of aboriginal rights, focussing on the distinctions between generic and specific rights, exclusive and non-exclusive rights, and depletable and non-depletable rights.

¹ *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313.

² *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.).

³ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.).

II. *The Common Law Doctrine of Aboriginal Rights*

The indigenous peoples of Canada originally had the status of independent entities in international law, holding title to their territories and ruling themselves under their own laws.⁴ However, by a variety of historical processes spread over several centuries, their position changed and they became protected nations, connected by binding links to the Crown, which assumed the role of overall suzerain.⁵ The relationship between indigenous peoples and the Crown is governed by a distinct branch of law known as the *doctrine of aboriginal rights*.

In a nutshell, the doctrine of aboriginal rights is a body of Canadian common law⁶ that defines the constitutional links between aboriginal peoples and the Crown and governs the interplay between indigenous systems of law, rights and government (based on aboriginal customary law) and standard systems of law, rights and government (based on English and French law). The doctrine of aboriginal rights is a form of "inter-societal" law, in the sense that it regulates the relations between aboriginal communities and the other communities that make up Canada and determines the way in which their respective legal institutions interact.⁷

⁴ *Calder v. British Columbia (A.G.)*, *supra* note 1, per Hall J. at 383, quoting *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C. 1832), at 542-43; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1053; B. Slaterry, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osg. Hall L.J. 681. The terms "indigenous peoples", "aboriginal peoples", and "Indian peoples" will be used interchangeably in this paper. In ordinary discourse, the term "Indian" usually has a narrower meaning, which excludes Inuit and Métis peoples, however in Canadian legal usage it often refers to indigenous peoples generally.

⁵ This distinctive status is reflected in the *Royal Proclamation of 1763*, which speaks of "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection ..."; *Royal Proclamation of 7 October 1763*, in C.S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Mass.: American Antiquarian Society, 1911), 212. The term "suzerain" is more apt than "sovereign" in this context because it accommodates the existence of protected political entities that retain their collective identities and some measure of internal autonomy.

⁶ By "Canadian common law", I mean simply the unwritten law applied by Canadian courts, whether in "common law" or "civil law" jurisdictions. I do not mean English common law, as received in certain parts of Canada. In certain spheres (notably that of aboriginal rights), Canadian common law operates uniformly across the country.

⁷ The concept that the law of aboriginal rights is "inter-societal" was endorsed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 547, citing M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350, at 412-13; B. Slaterry, "The Legal Basis of Aboriginal Title", in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992), at 120-21; and B. Slaterry, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, at 737. See also: J. Borrows & L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9. Of course, the various communities that make up Canada overlap; an individual may be a member of an aboriginal nation, a Nova Scotian and a Canadian simultaneously.

The doctrine of aboriginal rights has two main sources. The first source is a distinctive body of custom generated by the intensive relations between indigenous peoples and the British Crown in the seventeenth and eighteenth centuries. This body of custom coalesced into a branch of British imperial law, as the Crown gradually extended its protective sphere in North America. Upon the emergence of Canada as an independent federation, it became part of the fundamental Canadian common law that underpins the Constitution.

The second source of the doctrine of aboriginal rights consists of basic principles of justice. These principles have broad philosophical foundations, which do not depend on historical practice or the actual tenor of Crown relations with aboriginal peoples. They provide the doctrine of aboriginal rights with its inner core of values and mitigate the rigours of a strictly positivistic approach to law. Basic principles of justice have always informed the common law doctrine of aboriginal rights to some extent. However, in modern times, their influence has been enhanced by the entrenchment of aboriginal and treaty rights in s. 35(1) of the *Constitution Act, 1982*.⁸ These two sources – historical and philosophical – operate in tandem to support and nourish the doctrine of aboriginal rights in Canadian law. The two sources are not completely distinct but interact in myriad and complex ways: correcting, completing and reinforcing each other.

As fundamental law, the doctrine of aboriginal rights operates uniformly throughout Canada. This holds true despite the fact that the various territories comprising Canada have distinctive histories and laws and were acquired by the Crown in different ways. So, the operation of the doctrine of aboriginal rights is not affected by the fact that French civil law is the basis of private law in Quebec while English common law is the foundational law in the rest of Canada. This uniformity is explained by the distinctive origins of the doctrine and its status as federal common law.⁹ The following sections explore these points in greater detail.

⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁹ In *R. v. Côté*, [1996] 3 S.C.R. 139, at 173, the Court stated that the law of aboriginal title “represents a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province ...”, citing *Roberts v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at 340, and Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993), at 20. For discussion, see J. M. Evans & B. Slattery, “Case Note: Federal Jurisdiction—Pendent Parties—Aboriginal Title and Federal Common Law—Charter Challenges—Reform Proposals: *Roberts v. Canada*” (1989) 68 Can. Bar Rev. 817, at 829-32.

A. *Ancient Custom*¹⁰

The principal source of the doctrine of aboriginal rights is an ancient body of inter-societal custom that emerged from relations between British colonies and neighbouring Indian nations in eastern North America.¹¹ The principles informing this body of custom were suggested by the actual circumstances of life in America, the laws and practices of indigenous societies, imperial law and policy, and broad considerations of comity and justice. As early as the seventeenth century, certain elements of these principles can be discerned in aboriginal-British practice emanating from New England, New York, Virginia, and other English settlements along the Atlantic seaboard. They assumed more definite forms during the eighteenth century and were reflected in numerous Anglo-Indian treaties and Crown instruments.¹² By the time the *Royal Proclamation of 1763*¹³ was issued, they had coalesced into a distinct branch of common law now known as the doctrine of aboriginal rights. This doctrine formed part of the special body of British law dealing with the Crown's overseas dominions — "imperial constitutional law", or "imperial law" for short.¹⁴

The doctrine of aboriginal rights developed at the same time as other basic doctrines of British imperial law and shared essentially the same juridical character. Just as imperial law governed such matters as the status of colonies and their lands, the application of English law, and the relative powers of local assemblies and the Imperial Parliament, it also harboured rules concerning the status of indigenous peoples and their lands, the operation of their laws, and the relationship between aboriginal and colonial institutions.

¹⁰ This section draws on B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 728-29, 736-41.

¹¹ The process is well-described by Strong J. in *St. Catharine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, at 607-16, quoted with approval by Hall J. in *Calder v. British Columbia (A.G.)*, *supra* note 1 at 376-79. See also B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), at 17-38; B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 732-41; B. Slattery, "The Legal Basis of Aboriginal Title", *supra* note 7 at 113-21; J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623; J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629.

¹² See M. D. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785; B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (D.Phil. Thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979), at 95-282.

¹³ *Royal Proclamation of 7 October 1763*, in C.S. Brigham, ed., *British Royal Proclamations Relating to America*, *supra* at 212. For the Proclamation's meaning and effects, see J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; B. Slattery, *The Land Rights of Indigenous Canadian Peoples*, *supra* note 12 at 191-349.

¹⁴ For the status of imperial law, see B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L.R. 369, at 375-84. In older usage, imperial law is often described as "colonial law".

The doctrine of aboriginal rights, like other doctrines of imperial law, applied automatically to a new colony when it was acquired.¹⁵ As such, the doctrine furnished the presumptive legal structure governing the position of indigenous peoples throughout British territories in North America. The doctrine applied, then, to every former British territory now incorporated in Canada, from Newfoundland to British Columbia, and from Québec in the south to Rupert's Land in the north. Although the doctrine was a species of unwritten British law, it was not English common law in the narrow sense, and its application to a colony did not depend on whether or not English law was imported en bloc. It was part of a larger body of fundamental constitutional law that governed a colony regardless whether the local law was English, French, aboriginal, or some other type. Thus, the doctrine of aboriginal rights automatically extended to New France when Great Britain acquired the territory in 1760-63, and the doctrine was not affected by the subsequent confirmation of local French law in the *Quebec Act* of 1774.¹⁶ As such, the doctrine limits the extent to which French civil law applies to indigenous peoples in Québec, just as it curtails the application of English common law in the rest of Canada.

This consideration explains the continuance of indigenous customary law in Canada, a phenomenon long recognized in our courts (if not always well-understood).¹⁷ When the Crown gained suzerainty over a North American territory, the doctrine of aboriginal rights provided that the local customs of the indigenous peoples would presumptively continue in force, except insofar as they were unconscionable or incompatible with the Crown's suzerainty. This provision resembles the imperial rule governing conquered and ceded colonies, which holds that the local law of the colony remains in force, subject to similar exceptions. However, the doctrine of aboriginal rights has a broader application than the imperial rule regarding conquests and takes effect regardless whether the territory was acquired by conquest, cession, settlement, annexation, tacit acquiescence, or some other method. It should be stressed that the doctrine is distinct from the rule governing the survival of local custom in England and is animated by different considerations. It would be as inappropriate to apply the tests governing English local custom to aboriginal peoples as it would be to saddle them with the rule against perpetuities.

The Québec case of *Connolly v. Woolrich* (1867)¹⁸ provides an interesting example of the doctrine's operation. In that case, the courts considered the validity of a marriage contracted in the Canadian North-West under Cree customary law between an Indian woman and a man of European descent. The

¹⁵ See *R. v. Côté*, *supra* note 9 at 173; citing B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 737-38.

¹⁶ 14 Geo. III, c. 83 (U.K.).

¹⁷ See, e.g., *Re Noah Estate* (1961), 32 D.L.R. 185 (N.W.T.T.C.), and N. K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" [1984] 4 C.N.L.R. 1.

¹⁸ *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Qué. S.C.); reproduced in 1 C.N.L.C. 70. The decision was upheld on appeal *sub nom. Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266 (Qué. Q.B.); 1 C.N.L.C. 151.

courts upheld the marriage, notwithstanding the fact that the man had later purported to marry another woman in a Christian ceremony under Québec law. In attempting to discredit the first marriage, the second wife argued that English common law had been introduced into the North-West before the marriage took place, thus invalidating Indian custom. In any case, she said, the marriage customs of the Cree could not be recognized by the courts, even as among the Cree themselves. These arguments did not persuade the trial judge. He noted that the first English and French settlers in the North-West found the country in the possession of numerous and powerful Indian tribes. Even if the settlers brought with them the laws of their mother countries,

yet, will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives.¹⁹

From its origins in British imperial law, the doctrine of aboriginal rights has passed into Canadian common law and operates uniformly across Canada.²⁰ The doctrine was inherited not only by Canada but also by the United States after the American Revolution. A series of early decisions written by Chief Justice Marshall of the United States Supreme Court review the history of British dealings with indigenous peoples in America and identify certain principles implicit in those dealings.²¹ These decisions perform for the doctrine of aboriginal rights what Lord Mansfield's celebrated decision in *Campbell v. Hall*²² performs for other principles of imperial law, providing structure and coherence to an untidy and diffuse body of common law based on official practice.²³ While the Marshall decisions deal with the distinctive situation of the United States, they identify a number of basic principles that have an obvious relevance to Canada and have won the approval of our courts.

The recent decisions of the Supreme Court of Canada testify to the common law foundations of aboriginal rights.²⁴ In dealing with such subjects as the

¹⁹ *Connolly v. Woolrich*, *ibid.* at 84.

²⁰ The transformation of imperial legal principles into rules of Canadian common law is examined in B. Slatery, "The Independence of Canada", *supra* note 14 at 390-92.

²¹ See esp. *Johnson v. M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823); *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C. 1832).

²² (1774), Lofft 655 (K.B.).

²³ *R. v. Van der Peet*, *supra* note 7 at 541, citing an earlier version of this passage in B. Slatery, "Understanding Aboriginal Rights", *supra* note 7 at 739.

²⁴ See esp. *Roberts v. Canada*, *supra* note 9 at 340; *R. v. Van der Peet*, *supra* note 7 at 538; *R. v. Côté*, *supra* note 9 at 173-74; J. M. Evans & B. Slatery, "Case Note: Federal Jurisdiction—Pendent Parties—Aboriginal Title and Federal Common Law—Charter Challenges—Reform Proposals: *Roberts v. Canada*", *supra* note 9 at 829-32; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993), *supra* note 9 at 20.

existence and nature of aboriginal title, the character of customary rights, the fiduciary obligations of the Crown, and the effects of Indian treaties, the Court treats them as matters of Canadian common law, which exists independently of statute or executive order. The Court clearly assumes that the common law governing these subjects is uniform and does not vary from place to place. There is no suggestion that the law is unique to the specific provinces under consideration. This uniformity means that for many purposes there is no need to determine precisely which territories are covered by the Indian provisions of the *Royal Proclamation of 1763*. While there is reason to think that the *Proclamation's* basic provisions apply across Canada,²⁵ the question is rendered moot by the fact that the common law principles reflected in the *Proclamation* are in force throughout the entire country.

The fruits of this approach are evident in the *Guerin* case,²⁶ which involved an action by the Musqueam band of British Columbia against the federal government. The band possessed valuable reserve lands in the City of Vancouver. They alleged that, in 1957, the government induced them to surrender part of their reserve to the Crown for leasing to a golf club, with the rent to be applied to the band's account. After obtaining the surrender from the band, the government leased the land to the golf club for seventy-five years on terms much less favourable than the band had agreed to and did not even give them a copy of the lease until twelve years later. Evidence showed that the lands were potentially among the most valuable in Vancouver and could have commanded a much higher rent. The band argued that the government was guilty of a breach of trust, and asked for damages. The government responded that it was not legally responsible to the band for what it did with the lands after the surrender. In effect, it might have leased the lands on whatever terms it saw fit, regardless of what it had told the band earlier. The government's only responsibility to the band was political rather than legal.

The Supreme Court unanimously rejected the government's arguments and held it legally accountable for its actions, awarding the band ten million dollars in damages. The principal opinion was written by Dickson J., who based his decision squarely on the concept of aboriginal land rights. He held that aboriginal title is a legal right derived from the indigenous peoples' historic occupation of their lands. That title both pre-dated and survived the claims to sovereignty made by European nations in colonizing North America. Although aboriginal title was recognized in the *Royal Proclamation of 1763*, it has an independent basis in Canadian common law. It entitles indigenous peoples to possess their homelands until their title is extinguished by a voluntary cession to the Crown or by legislation. As provided in the *Proclamation*, aboriginal

²⁵ See K. M. Narvey, "The Royal Proclamation of 7 October 1763. The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1973-74) 38 Sask. L. Rev. 123; B. Slaterry, *The Land Rights of Indigenous Canadian Peoples*, *supra* note 12 at 175-282; B. Slaterry, "The Legal Basis of Aboriginal Title", *supra* note 7 at 121-29.

²⁶ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

peoples have a special relationship with the Crown whereby they cannot dispose of their lands to third parties but may only cede them to the Crown. As such, the Crown serves as an intermediary between aboriginal peoples and individuals wishing to purchase or lease their lands. This relationship gives rise to a distinctive fiduciary obligation on the part of the Crown to deal with ceded lands for the benefit of the aboriginal peoples. If the Crown fails in the performance of its fiduciary duties, it is liable in damages.

In *Guerin*, then, the Court treats a rule embodied in the *Royal Proclamation of 1763* as operable in British Columbia, without entering into the question whether the Proclamation as such applies there.²⁷ *Guerin* also stands for the proposition that statutes and other acts concerning aboriginal people should be read in the light of the common law of aboriginal rights, and the Court adopts this approach in interpreting the provisions of the Indian Act.²⁸ By implication, the common law also provides the context for understanding treaties signed with Indian nations, as well as such important constitutional provisions as s. 91(24) of the *Constitution Act, 1867*,²⁹ and ss. 25 and 35 of the *Constitution Act, 1982*.

As a common law doctrine, albeit a fundamental one, the doctrine of aboriginal rights could in principle be overridden or modified by legislation passed by a competent legislature, in the absence of constitutional barriers such as those embodied in the *Royal Proclamation of 1763* and s. 35(1) of the *Constitution Act, 1982*. This conclusion flows from a standard doctrine of British law attributing paramountcy to Acts of Parliament.³⁰ It seems doubtful whether aboriginal peoples initially understood or accepted the principle that their basic rights could be unilaterally altered by statute, and Crown agents were often less than candid on this point when they negotiated treaties with Indian nations. Nevertheless, in practice, the impact of the doctrine of Parliamentary sovereignty has been muted by the fact that, throughout much of Canadian history, the powers of local Canadian legislatures to affect aboriginal rights have been subject to certain constitutional restrictions.³¹

The doctrine of aboriginal rights has a number of distinct branches. The part dealing specifically with aboriginal lands is called the doctrine of aboriginal title.³² Other branches of the doctrine deal with such matters as customary rights, powers of self-government, the fiduciary role of the Crown, and the status and effects of treaties. Here we can only sketch the outlines of these subjects and indicate their inter-relationships.

²⁷ *Ibid.* Dickson J. at 376-79, 383-84, Estey J. at 392.

²⁸ *Ibid.* esp. Dickson J. at 383-87, Wilson J. at 348-50.

²⁹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

³⁰ For the genesis of this doctrine in the colonial context, see B. Slattery, *The Land Rights of Indigenous Canadian Peoples*, *supra* note 12 at 384-90.

³¹ See B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 774-82.

³² *R. v. Van der Peet*, *supra* note 7 at 540.

B. Basic Principles of Justice

As just seen, the origins of the doctrine of aboriginal rights can be traced to the customary *modus vivendi* reached between aboriginal peoples and the British Crown during the seventeenth and eighteenth centuries, as reflected in the *Royal Proclamation of 1763*. However, the doctrine's inner dynamic has always been linked to fundamental principles of justice, as expressed in the distinctive fiduciary role assumed by the Crown as the protector of aboriginal peoples — a role encapsulated in the phrase "the honour of the Crown".³³ These basic principles of justice constitute the second major source of the doctrine of aboriginal rights.

In recent years, the influence of this source has been enhanced by the enactment of s. 35(1), *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights. The broad significance of this provision was underlined by the Supreme Court in the landmark *Sparrow* decision.³⁴ The Court indicated that s. 35(1) places aboriginal and treaty rights on a new footing and infuses them with the fundamental values and principles that pervade the Constitution of Canada as a whole. So doing, it renounces the old colonial framework, which at times arguably recognized aboriginal and treaty rights only in partial and attenuated forms and subordinated them to the will of Parliament. At the same time, s. 35(1) indicates that the past cannot be entirely reversed. It limits the scope of the section to the "existing" rights of the aboriginal peoples. This word serves to indicate that certain rights originally held by aboriginal peoples were extinguished prior to 1982 and cannot be revived without injustice to third parties or serious disruption of the social order. Such rights do not qualify as "existing" rights and do not gain the protection of the section.

The concrete implications of this approach were spelled out in the *Côté* case.³⁵ The appellants, who were members of the Algonquin people, were convicted of regulatory offences arising from an expedition to a wilderness zone in the Outaouais region of Québec. The purpose of the expedition was to teach traditional hunting and fishing techniques to young aboriginal students. The appellants asserted that they were exercising aboriginal rights under s. 35(1). The Crown replied that no aboriginal rights could have survived the French assertion of sovereignty over New France because under French colonial law the Crown assumed full ownership of all lands in the territory. In deciding the case, the Supreme Court expressed its scepticism of the Crown's account of the status of aboriginal rights under the French legal regime. However, it held that the case could be resolved simply on the basis of s. 35(1), which "changed the landscape of aboriginal rights in Canada". The advent of French sovereignty did

³³ See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1107-10; *R. v. Van der Peet*, *supra* note 7 at 536-37.

³⁴ *R. v. Sparrow*, *ibid.* esp. at 1091, 1103-06.

³⁵ *R. v. Côté*, *supra* note 9 at 168-75. See also *R. v. Adams*, [1996] 3 S.C.R. 101, at 120-22.

not negate the potential existence of aboriginal rights in New France for the purposes of s. 35(1). If practices, customs and traditions central to aboriginal societies continued after European contact, they were entitled to constitutional protection under s. 35(1) unless specifically extinguished. The absence of formal recognition in French colonial law should not undermine that protection. The French regime's failure to recognize legally a specific aboriginal practice cannot be equated with a "clear and plain" intention to extinguish the practice, as s. 35(1) requires.

The Court observed that the Crown's argument would create an awkward patchwork of constitutional protection for aboriginal rights across Canada, depending on the distinctive historical patterns of colonization prevailing in different regions. Such a "static and retrospective" interpretation of s. 35(1) could not be reconciled with the noble and prospective purpose of constitutional entrenchment. It would risk undermining the very rationale of the section, by "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies." So, even assuming that the French Crown did not recognize any aboriginal rights in New France, an aboriginal group could still possess aboriginal rights within those territories for the purposes of s. 35(1).

Here the Supreme Court indicates that, in ascertaining the existence of aboriginal rights under s. 35(1), it will not blindly endorse the tenets of colonial legal regimes but will ensure that the inquiry is informed by basic considerations of justice. It will not allow s. 35(1) to be interpreted in a manner that simply perpetuates historical injustices visited on aboriginal people in colonial times. In particular, the Court rejects the view that the advent of French sovereignty or general principles of French colonial law were capable in themselves of extinguishing aboriginal rights for the purposes of s. 35(1). However, at the same time the Court acknowledges that aboriginal rights could be extinguished by specific Crown acts that were sufficiently clear and plain.

III. *Historic Treaties*

From an early period in the European penetration of North America, it became customary for relations between the Crown and Indian nations to be conducted by means of publicly negotiated agreements styled "treaties". This practice, which was well-established by the close of the seventeenth century, continued into the early years of the twentieth century and more recently has been revived as a mode of settling aboriginal claims. The contemporary pattern of treaty-making has changed significantly from the model of earlier eras and so is governed by somewhat different considerations. Here, we will confine our discussion to "historic treaties".³⁶

³⁶ We also leave aside inter-state treaties which contain undertakings regarding indigenous peoples.

In this context, the term "treaty" has been interpreted broadly as encompassing all engagements made to aboriginal peoples by representatives of the Crown or other persons in authority.³⁷ As consensual agreements, historic treaties vary widely in their terms.³⁸ However, just as ordinary contracts are governed by uniform principles embodied in the overarching law of contract, treaties are necessarily governed by a uniform body of law, which determines their existence, legal character, interpretation and effects. Which body of law governs historic treaties between the Crown and aboriginal peoples? Is it English common law, or the customary law of the aboriginal people in question? Or is it perhaps international law?

This inquiry touches on the much-debated question whether Indian treaties, considered as a class, are international agreements or domestic agreements governed by Canadian law.³⁹ However, as traditionally framed, this question poses false alternatives. It seems unlikely that all agreements styled "Indian treaties" share exactly the same legal character. A different conclusion is suggested by the widely varying circumstances in which historic treaties were concluded and the disparate purposes they served. In any case, there is reason to think that some treaties constitute *both* international and domestic instruments, producing legal effects at both levels. International law and Canadian law are distinct and potentially overlapping systems of rules. On occasion, both systems may recognize certain transactions as valid and attach legal consequences to them, each within its proper sphere.

Here we will not be able to examine the international status of Indian treaties and will confine our attention to their position in Canadian law. Viewed in this context, it seems clear that historic treaties are governed, neither by English common law nor aboriginal customary law, but by a unique body of treaty law that forms a branch of the doctrine of aboriginal rights. As with other facets of the doctrine, this body of treaty law was generated by long-standing customary relations between aboriginal peoples and the Crown and is informed by basic principles of justice which engage the Crown's honour. So, the law of Indian treaties is *sui generis* and does not necessarily conform with international law, English contract law or aboriginal custom.⁴⁰ For example, ancient practice attests that Indian treaties bind (and benefit) not only the individuals who were members of the aboriginal group at the time the treaty was concluded, but also individuals born into that group at later periods. This rule holds true even assuming that it violates English rules regarding third party beneficiaries of a contract.

³⁷ *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 408-09; *R. v. Sioui*, *supra* note 4 at 1035-45.

³⁸ *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 25.

³⁹ See, e.g., *Simon v. The Queen*, *supra* note 37 at 398-401; *R. v. Sioui*, *supra* note 4 at 1038, 1052-56.

⁴⁰ *Simon v. The Queen*, *supra* note 37 at 404; *R. v. Sioui*, *supra* note 4 at 1038, 1043, 1056; *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.), at para. 44.

Historic treaties were profoundly influenced by Indian concepts, procedures and ceremonial and differed in a number of ways from treaties typical among European states. The outstanding difference for our purposes is the fact that normally they were oral rather than written agreements.⁴¹ An Indian treaty typically took the form of a spoken exchange of proposals and responses, often marked by special rituals, and usually taking place in several sessions extending over a number of days, leading to a firm understanding between the parties on certain matters. In principle, the content of such a treaty can be discovered only by consulting the oral exchanges to see which proposals were ultimately accepted by the parties, with what variations, and under what conditions. For this reason, detailed written transcripts of the entire proceedings of a treaty were sometimes kept by the English parties, while the Aboriginal parties would commit to memory the main terms of the oral agreement, using a variety of memory-aids, including beaded belts.

At times, the English parties recorded some of the treaty terms in a concise written document that the Indian parties would be asked to "sign". Such a document has sometimes come to be regarded as the "treaty". However, this conclusion is usually unwarranted. In most cases, the treaty was the oral agreement, and the written document just a memorial of that agreement, similar in status to the belts used by some Indian parties. Many such documents have proven to be unreliable guides to the oral compacts. They often record only matters of particular interest to the English parties and omit certain terms of significance to the Indian parties. Even the recorded terms may not represent an accurate or balanced account of the true oral bargain. The written documents were often translated to the Indian parties in a manner allowing ample opportunity for misunderstanding and distortion. Marks on a printed sheet of paper had about as much significance for many aboriginal peoples as the colours and patterns of a treaty belt had for many English. The treaty was neither the written memorial nor the belt but the agreement reached by the parties during the oral exchanges. In the absence of complete transcripts of those proceedings, the true content of a treaty can be determined only by a comprehensive assessment of all available sources of information, including any written memorials or accounts, but also oral tradition, the broader social and political objectives of the parties, and the history of their relationship.

Treaties served a broad range of purposes. In early years, they were often used to establish or confirm peace and friendship between the parties, to regulate matters of trade, to cement military and political alliances against other nations, or to resolve particular disputes or grievances. On other occasions, they were used to cede aboriginal lands to the Crown in return for stated benefits, to draw boundaries between aboriginal territories and areas open to settlement, or to describe in detail the limits of lands reserved for indigenous peoples within larger tracts ceded to the Crown.

⁴¹ *R. v. Badger*, [1996] 1 S.C.R. 771, at 798-99, 800-03; *R. v. Sundown*, *supra* note 38 at para. 24; *R. v. Marshall*, *ibid.* at paras. 14, 19, 40.

Despite these differences, many historic treaties are best understood as *constitutional agreements*, which establish or reaffirm a fundamental and enduring relationship between the Crown and an aboriginal people, and which evolve over time in response to new conditions. True, not all historic treaties fit this mould. Each treaty must be assessed in its own terms. But many historic treaties cannot readily be understood apart from the fact that the parties occupied a unique position vis-a-vis each other in Canadian law — the Crown as ultimate suzerain and protector, holding certain fiduciary obligations, and the aboriginal party as a protected and partially autonomous entity, owing ultimate allegiance to the Crown, but capable of acting independently within its own sphere of authority.

Are the terms of an historic treaty limited to those explicitly articulated by the parties, whether in the oral negotiations or the written memorial? Or do they also include certain *implied terms* based on the customary relations between the parties and any underlying assumptions? In the *Marshall* case,⁴² the Supreme Court took the latter view. Justice Binnie noted that, even under general contract law, it is recognized that when parties enter into agreements they make certain assumptions that give their arrangements efficacy. In such instances, courts will read an implied term into the contract on the basis of the presumed intentions of the parties where it is necessary to ensure the contract's efficacy, that is, where it meets the "officious bystander test". Binnie J. went on to hold:

If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.

Problems have arisen in the interpretation of many historic treaties. In light of the fiduciary obligations owed by the Crown to aboriginal peoples, the Supreme Court has held that treaty terms, both oral and written, should be interpreted generously, in a manner that is favourable to the aboriginal parties and takes full account of their concerns and perspectives in entering into the treaty.⁴³ Moreover, treaty provisions are not "frozen-in-time" but should be interpreted in a flexible and evolutionary manner that is sensitive to changing conditions and practices.⁴⁴

Questions have also arisen as to the enforceability of Indian treaties against the Crown. It now seems clear that, under Canadian common law, historic treaties are binding on the Crown and enforceable in its courts.⁴⁵ This conclusion is supported by a number of considerations. It would be incongruous if the

⁴² *R. v. Marshall*, *supra* note 40 at para. 43.

⁴³ *Simon v. The Queen*, *supra* note 37 at 402; *R. v. Sioui*, *supra* note 4 at 1035-36; *R. v. Badger*, *supra* note 41 at 794, 798-99.

⁴⁴ *Simon v. The Queen*, *supra* note 37 at 402-03; *R. v. Sundown*, *supra* note 38 at para. 32; *R. v. Marshall*, *supra* note 40 at para. 53.

⁴⁵ *Simon v. The Queen*, *supra* note 37 at 408-09; *R. v. Sioui*, *supra* note 4 at 1063; *R. v. Badger*, *supra* note 41 at 793-94.

Crown could now deny that it is bound by such treaties after consistently representing the contrary to aboriginal peoples over a period of several centuries. In equity, the Crown cannot be permitted to impugn the binding force of statements that have induced another party to surrender certain rights or otherwise alter its position to its detriment, as by accepting the suzerainty of the Crown or ceding tracts of aboriginal lands.⁴⁶

Prior to 1982, treaties were subject to the doctrine of Parliamentary sovereignty, which held that a competent legislature might enact statutes infringing the terms of an Indian treaty.⁴⁷ Nevertheless, courts should hold legislatures to a high standard of clarity in this area.⁴⁸ It cannot be lightly presumed that the Crown in Parliament would disregard promises made to an aboriginal group to which it owes fiduciary obligations. Of course, since 1982, a court may strike down legislation inconsistent with the terms of Indian treaties, under section 35(1) of the *Constitution Act, 1982*.⁴⁹

What is the relationship between treaty rights and aboriginal rights? Clearly, the relationship may vary, depending on the precise terms of the treaty and the overall context. In some cases, the treaty may recognize and guarantee certain existing aboriginal rights. In other instances, it may alter aboriginal rights, as by consolidating them, redefining them, sharing them, ceding them, or reshaping them in some other fashion. Where a treaty recognizes and guarantees aboriginal rights, it does not convert them into treaty rights, in the absence of very clear language to that effect. Treaty rights throw a protective mantle over aboriginal rights, providing an extra layer of security.⁵⁰ The latter become "treaty-protected" aboriginal rights.

What does this additional layer of protection entail? First, where the Crown guarantees certain aboriginal rights in a treaty, it forfeits any asserted power to alter those rights by a *unilateral prerogative act* — that is, a Crown act not supported by legislation enacted in Parliament or by a treaty with the affected aboriginal group. According to some views, the Crown held special prerogative powers to deal with aboriginal peoples, which it could exercise by simple royal

⁴⁶ *Guerin v. The Queen*, *supra* note 26 at 388-89; *R. v. Marshall*, *supra* note 40 at para. 12.

⁴⁷ *Simon v. The Queen*, *supra* note 37 at 411; *R. v. Marshall*, *supra* note 40 at para. 48.

⁴⁸ *Simon v. The Queen*, *supra* note 37 at 405-06; *R. v. Sioui*, *supra* note 4 at 1061; *R. v. Badger*, *supra* note 41 at 794. In *R. v. Marshall*, *supra* note 40 at para. 48, Binnie J. states that prior to the enactment of the *Constitution Act, 1982*, "the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants." However, in light of his subsequent discussion of the strict interpretive principles flowing from the "honour of the Crown" (in paras. 49-52), this statement should be understood as referring simply to the question of Parliamentary competence, rather than the applicable standards of interpretation.

⁴⁹ *R. v. Badger*, *supra* note 41 at 812-16; *R. v. Marshall*, *supra* note 40 at para. 48.

⁵⁰ *Simon v. The Queen*, *supra* note 37 at 401-02; see also *R. v. Marshall*, *supra* note 40 at para. 47.

act, such as letters-patent or order-in-council. Whatever the accuracy of these views, it is submitted that the Crown cannot exercise unilaterally any residual prerogative powers in a manner inconsistent with an historic treaty.

Second, treaty undertakings made by the Crown to aboriginal peoples give rise to particular fiduciary obligations to honour those undertakings—obligations that represent concrete instances of the Crown's more general fiduciary duties. So, as noted above, legislation passed by the Crown in Parliament should be construed as respecting the Crown's treaty undertakings, in the absence of language that specifically overrides the treaty provision. It is submitted that the requisite degree of legislative clarity is significantly higher in relation to treaty rights than it is to aboriginal rights, otherwise the treaty undertakings would not have the effect of *reinforcing* aboriginal rights, which are already protected by a rule of interpretation requiring "clear and plain" legislation.

IV. *Classes of Aboriginal Rights*

Aboriginal rights take many forms; however they also share certain general characteristics and so fall naturally into a number of classes, which we will now review. While our discussion focuses on aboriginal rights, some of our observations apply by extension to treaty rights, and we will draw several examples from that area. The links between aboriginal and treaty rights are not surprising because, as just noted, many treaty provisions reflect pre-existing aboriginal rights.

A. *Generic and Specific Rights*⁵¹

Aboriginal rights fall into two broad categories, which for convenience we may call *generic rights* and *specific rights*.⁵² A *generic* aboriginal right is a right of a standardized character held by all aboriginal groups that satisfy certain criteria. The basic contours of a generic right are determined by general principles of law rather than aboriginal practices, customs and traditions. So the broad dimensions of the right are identical in all groups where the right arises, even if certain concrete features of the right may vary somewhat from group to group. By contrast, a *specific* aboriginal right is a right distinctive to a particular aboriginal group. The overall dimensions of the right are determined by the historical practices, customs and traditions of the group in question. So, specific rights may differ substantially in form and content from group to group.

⁵¹ This section draws on B. Slattery, "Varieties of Aboriginal Rights" (1998) 6 Canada Watch 71.

⁵² Lamer C.J.C. tacitly recognizes a distinction of this kind in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at 1095-97; see also the remarks of La Forest J. at 1126-27.

Aboriginal title provides a good example of a generic right. In the *Delgamuukw* case, Chief Justice Lamer holds that aboriginal title is governed by two principles.⁵³ First, title gives an aboriginal group the right to the exclusive use and occupation of the land for a broad variety of purposes. These purposes do not need to be grounded in the historical practices, customs and traditions of the group. So, the group is free to use its lands in ways that differ from the ways in which the land was traditionally used. A group that lived mainly by hunting, fishing and gathering at the time of European sovereignty is free to farm the land, to ranch on it, to use it for eco-tourism or to exploit its natural resources. Second, lands held under aboriginal title cannot be used in a manner that is irreconcilable with the fundamental nature of the group's attachment to the land, so that the land may be preserved for use by future generations. In other words, the group may not ruin the land or render it unusable for its original purposes. These two principles define the basic contours of aboriginal title in all cases. As such, aboriginal title qualifies as a generic right. Nevertheless, it can be seen that the concrete application of the second principle is partly governed by a factor particular to the group — the nature of the group's original attachment to the land. So, while aboriginal title is basically a generic right, in one aspect it resembles a specific right.

Aboriginal title is not the only example of a generic right. For instance, an aboriginal right to speak an indigenous language would likely also be generic, because the basic structure of the right would presumably be identical in all groups where it arises, even though the specific languages protected would vary from group to group. As we will see later, the aboriginal right of self-government is probably also a generic right, because the powers of aboriginal governments and their place in the Canadian federal scheme are governed by uniform legal principles, even if the concrete forms that aboriginal governments take may often diverge.

By contrast, as stated in the *Van der Peet* case,⁵⁴ the character of a *specific* aboriginal right is determined by the historical practices, customs and traditions of the particular group in question and so differ from group to group. Specific aboriginal rights may be classified in three groups, according to their degree of connection with the land.⁵⁵ The *first* group comprises *site-specific* rights — rights that relate to a definite tract of land but do not amount to aboriginal title.

⁵³ *Delgamuukw v. British Columbia*, *ibid.* at 1083-91. For discussion, see K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. Comp. & Int'l L.* 253. The concept of aboriginal title is analysed in K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); K. McNeil, "The Meaning of Aboriginal Title", in M. Asch, ed., *Aboriginal and Treaty Rights in Canada*, (Vancouver: University of British Columbia Press, 1997); P. Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 *Osg. Hall L.J.* 125.

⁵⁴ *R. v. Van der Peet*, *supra* note 7. See also *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723.

⁵⁵ This classification was suggested by the Court's observations in *Delgamuukw v. British Columbia*, *supra* note 52 at 1094-95. Note that a similar classification could be applied to generic rights.

For example, where an aboriginal people regularly hunted on certain lands adjoining its ancestral territory but never occupied them on a permanent basis, it may nevertheless hold a site-specific hunting right in those lands.⁵⁶

The *second* group of specific aboriginal rights consists of land-based rights that are not tied to any *particular* tract of land – what may be called *floating rights*. A floating right is the right to engage in certain land-related activities on any lands to which members of the group have access, whether as aboriginal people or as ordinary members of the public. Consider the case where an aboriginal group has traditionally gathered wild plants for medicinal purposes. Let us suppose that these plants are not found in any particular place but grow freely in various locations, which change from year to year. It happens that the active ingredients in some of these plants are listed as “restricted drugs” in the *Food and Drugs Act*.⁵⁷ If members of the group were charged with possession of restricted drugs under the Act, they might be able to defeat the charge by establishing an aboriginal right to gather the plants for medicinal purposes. Here the aboriginal right would be a “floating right” because, although it involves a use of land, it is not tied to any specific tract of land.

In the *third* group we find specific aboriginal rights that are not necessarily linked with the land at all – *cultural rights* for short. Like other specific rights, cultural rights are grounded in the historical practices, customs and traditions of a particular aboriginal group. Their distinguishing characteristic is the fact they do not involve any particular use of the land. For example, a group might have an aboriginal right to perform certain traditional dances that are not connected with any particular location and do not involve “using” the land in a way that transcends the normal effects of human activity.

Although the distinction between generic and specific rights is clear in principle, it is less sharp in practice. What the courts initially regard as a specific right, distinctive to a particular group, may later prove to be a concrete instance of a generic right, if rights sharing the same basic structure are found to exist in a substantial number of aboriginal societies. For example, a specific right to perform certain religious rites might constitute the concrete manifestation of a generic right to practice indigenous religions. In short, as the jurisprudence of aboriginal rights evolves, specific rights may gradually be subsumed under general headings relating to generic rights.

Is the right of self-government a generic or a specific aboriginal right? In the *Pamajewon* case,⁵⁸ the Court viewed the question of self-government through the lens of specific rights, as provided by the *Van der Peet* decision, and held that the right of self-government would have to be proved as an element of specific practices, customs and traditions integral to the particular aboriginal society in question. According to this approach, the right of self-government would consist of a bundle of specific rights to govern particular activities rather

⁵⁶ *Delgamuukw v. British Columbia*, *ibid.* at 1094-95.

⁵⁷ R.S.C. 1985, c. F-27, s. 46, and Schedule H.

⁵⁸ *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at 832-33.

than a generic right to deal with a range of more abstract subject-matters. However, *Pamajewon* was decided before the Court's holding in *Delgamuukw*, which significantly broadened our understanding of aboriginal rights and furnished us with the alternative category of generic rights.

In the light of *Delgamuukw*, it now seems preferable to treat the right of self-government as a generic aboriginal right rather than as a bundle of specific rights. On this view, the right of self-government is governed by uniform principles laid down by Canadian common law. The basic structure of the right does not vary from group to group; however its application to a particular group may differ depending on the local circumstances. This is the approach to the right of self-government taken in the Report of the Royal Commission on Aboriginal Peoples, which the Supreme Court cites in its brief comments on self-government in *Delgamuukw*.⁵⁹

However, it could be argued that certain observations in *Delgamuukw* rule out this approach. In declining to be drawn into an analysis of self-government, the Court reiterates its holding in *Pamajewon* that rights to self-government cannot be framed in "excessively general terms". It notes that in the current case the aboriginal parties advanced the right to self-government "in very broad terms, and therefore in a manner not cognizable under s. 35(1)."⁶⁰ On one interpretation, these remarks support the view that the right of self-government is a bundle of specific rights, governed by the criteria laid down in *Van der Peet*. However, I suggest that these comments are better read simply as a warning against over-ambitious litigation, which attempts to induce the courts to settle very abstract and difficult questions without an appropriate factual or argumentative context.⁶¹

Elsewhere in *Delgamuukw*, the Court indicates an approach to the question of self-government that builds on the concept of aboriginal title. In discussing the communal nature of the title, Lamer C.J. states:

Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. *Decisions with respect to that land are also made by that community.*⁶²

⁵⁹ *Delgamuukw v. British Columbia*, *supra* note 52 at 1115; see Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), Vol. 2, Part 1, especially at 163-280. On the right of self-government, see P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; B. Slatery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261; P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanf. L. Rev. 1311.

⁶⁰ *Delgamuukw v. British Columbia*, *supra* note 52 at 1114-15.

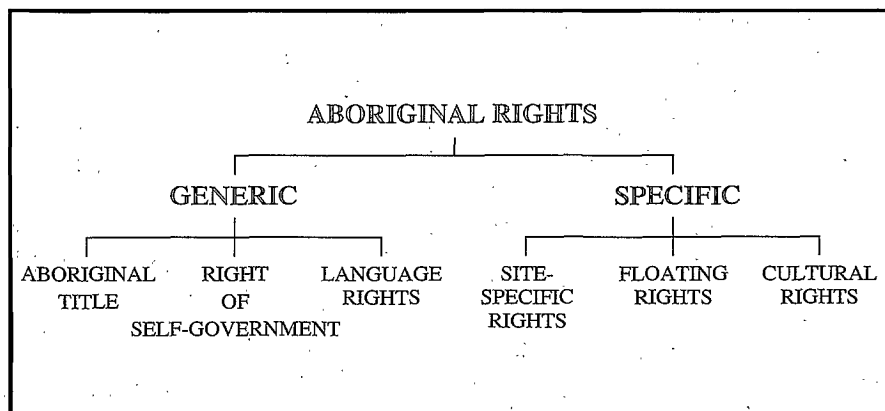
⁶¹ As the Court states: "The broad nature of the claim [of self-government] at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. ... We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach."; *ibid.* at 1115.

⁶² *Ibid.* at 1082-83; emphasis added.

This point has two important ramifications.⁶³ First, the manner in which the members of the group use their aboriginal lands is presumptively governed by the internal law of the group. So, in effect, the concept of aboriginal title supplies a protective legal umbrella, in the shelter of which customary land law may develop and flourish. Second, since decisions with respect to the lands must be made by the community, there must be some internal structure for communal decision-making.

The need for a decision-making structure provides an important cornerstone for the right of aboriginal self-government. At a minimum, an aboriginal group has the inherent right to make communal decisions about how its lands are to be used. In particular, the group may determine how to apportion the lands among group members, make grants and other dispositions of the communal property, lay down laws and regulations governing land-use, impose taxes relating to the land, determine how any land-based revenues are to be expended, and so on. Since aboriginal title is itself a generic right, it follows that the right to make communal decisions about aboriginal lands is also a generic right whose basic legal contours do not vary from group to group. Nevertheless, the precise application of this right and the particular modalities of self-government that it supports will clearly be governed by factors specific to the group.

Our discussion is summarized in the following diagram:



B. Proving Specific Rights

In *Van der Peet*, the Supreme Court holds that, in order to qualify as a specific aboriginal right, an activity must be based on a practice, custom or tradition that was integral to the distinctive culture of the specific aboriginal group prior to European contact.⁶⁴

⁶³ See discussion in K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty", *supra* note 53.

⁶⁴ *R. v. Van der Peet*, *supra* note 7 at 549, 554-55.

This criterion has two basic facets. First, the practice, custom or tradition must have been *integral* to the culture of the aboriginal group; that is, it must have been a “central and significant” part of the culture, one of the things that made the society what it was. So aspects of an aboriginal society that were only “incidental or occasional” do not qualify; they need to have been “defining and central attributes” of the society.⁶⁵ A practice must have constituted a distinctive or characteristic element of the society; however, there is no need to show that the practice was unique to the group or different from the practices of other societies.⁶⁶

Second, the practice, custom or tradition must have been integral to the aboriginal society *in the period prior to European contact*.⁶⁷ For a modern activity to qualify as an aboriginal right, it must have continuity with pre-contact practices, customs or traditions. Nevertheless, aboriginal rights are not frozen in the form that they assumed in pre-contact times but may evolve into modern forms that represent an adaptation to new conditions.⁶⁸ The fact that a pre-contact practice, custom or tradition has changed in response to the arrival of Europeans does not necessarily break the chain of continuity. However, a practice, custom or tradition that arose solely or primarily as a response to European influences will not meet the required standard.⁶⁹

In effect, the second requirement holds that specific aboriginal rights must be of a certain vintage. They must find their origins in a stock of practices, customs and traditions that existed at a particular *threshold date*. In *Van der Peet*, Lamer C.J. holds that the appropriate threshold date is the time of “contact”, when the particular aboriginal people first encountered Europeans. He rejects alternative threshold dates such as the time that a European state first asserted sovereignty over the aboriginal people in question, or the time that the Crown established effective governmental authority in the area.

The significance of this approach is demonstrated by the facts in *Van der Peet*. The appellant, a member of the Sto:lo nation, was charged with selling fish caught under an Indian food fishing licence. The applicable regulations prohibited the sale of fish caught under such a licence. The appellant argued that the regulations infringed her aboriginal right to sell fish and were invalid under s. 35(1), *Constitution Act, 1982*. At trial, the court found that prior to European contact the Sto:lo had traded fish only casually or for ceremonial purposes; however, once Europeans established themselves in the region, the Sto:lo developed a well-defined trade in fish with the Hudson’s Bay Company. On these facts, the Supreme Court ruled that the appellant had failed to show the existence of an aboriginal right, since the evidence was insufficient to establish

⁶⁵ *Ibid.* at 553.

⁶⁶ *Ibid.* at 560-61.

⁶⁷ *Ibid.* at 554-55.

⁶⁸ *Ibid.* at 556-67.

⁶⁹ *Ibid.* at 561-62, 570. The Court uses the term “solely” at 562 but adopts the term “primarily” in applying the criterion to the facts at 570.

that the trade in fish was an integral part of Sto:lo society at the time of European contact. The trade with the Hudson's Bay Company was qualitatively different from that existing on contact and arose primarily as a result of European influence; as such, it could not help the appellant's case.⁷⁰ However, the Court's ruling might well have been different had it chosen the time of Crown sovereignty as the threshold date, since the trade with the Hudson's Bay Company had emerged by that date.⁷¹

We may observe that the Court's choice of threshold date is somewhat puzzling.⁷² In British imperial law, the simple fact of "contact" between the Crown and indigenous peoples had no legal significance. Contact did not give indigenous peoples any rights in British law, nor did it have any legal impact on indigenous systems of law and rights. Contact was a legally innocent event. It was only when the Crown acquired jurisdiction over a territory that the issue of the rights of the local inhabitants arose in British law. Only at this point could the doctrine of aboriginal rights come into play. So, while it would not be *impossible* for the doctrine to recognize only customary rights that existed at some prior date of "contact", in practice this would be a strange and inconvenient way for the doctrine to operate. It would have made it virtually impossible for British officials on the spot at the time to know which asserted aboriginal rights they should respect, without a battery of historians and anthropologists at their elbows. Not surprisingly, there seems to be no historical evidence that imperial law actually functioned in this manner.

In the subsequent case of *Delgamuukw*, the Court ruled that the threshold date for aboriginal title was the time of *Crown sovereignty* rather than *contact*.⁷³ The Court aptly observed that, since aboriginal title was a burden on the Crown's underlying title, it did not make sense to speak of its existence prior to the date of sovereignty. However, the Court did not overrule the *Van der Peet* criterion as it applies to specific rights. This gives rise to an odd discrepancy. Suppose that an aboriginal group of hunters moved into a certain area *after* the date of contact but substantially *before* the date of Crown sovereignty.⁷⁴ Under current law, the group would apparently be precluded from showing an aboriginal right to hunt in the area; however, paradoxically, it might be able to establish aboriginal title there, despite the fact that aboriginal title would include

⁷⁰ *Ibid.* at 564-71.

⁷¹ *Ibid.* at 532.

⁷² For discussion, see K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 *Alta. L. Rev.* 117, at 118, 128-33; J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 *Constitutional Forum* 27.

⁷³ *Delgamuukw v. British Columbia*, *supra* note 52 at 1098-99. For discussion, see K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty", *supra* note 53.

⁷⁴ In some parts of Canada, contact took place long before the date that sovereignty was asserted or achieved. In the interval, there was often considerable movement among aboriginal groups, as people migrated from one area to another in response to such factors as war, internal strife, trade opportunities, and changing ecological conditions.

hunting rights. In effect, the test for the lesser right is more onerous than for the greater right. The anomaly is compounded where Group A occupied the area at the time of contact but had been displaced by Group B by the time of sovereignty. Here, Group A could show a specific aboriginal right to hunt in the area but not aboriginal title. By contrast, Group B could show aboriginal title but not a specific right to hunt. Such complications suggest the need a *common historical baseline* for establishing both aboriginal title and specific aboriginal rights.

Of course, the Court's approach to specific rights in *Van der Peet* has a plausible explanation. The aboriginal right asserted there involved the exploitation of limited fishing resources – resources that the aboriginal group likely shared with other user groups, including commercial and sports fishers, as well as other aboriginal groups. No doubt, the Court was concerned about the impact of a favourable ruling on other user groups. However, it seems doubtful whether adopting an artificial threshold date is the best way to solve this problem. In the end, the equitable sharing of resources is better attained through governmental regulations that meet the standards of section 35(1), coupled with agreements with the groups concerned.

What is the alternative to the *Van der Peet* approach? We suggest that specific aboriginal rights may be proven in either of two ways:

- (1) Historical evidence showing that the right was a recognized strand in the fiduciary relationship established at the time when the Crown assumed governmental responsibility for the particular aboriginal people in question (the "transition date"). The evidence could consist of official practice, legislation, negotiations or treaties, and it could emanate either from the era when the Crown assumed responsibility, or from periods before or after that era, so long as it tended to show the basic terms of the relationship at the transition date.
- (2) Proof that the right is grounded in practices, customs or traditions that were integral to the distinctive culture of the specific aboriginal group at the transition date.

The second criterion can be linked to the first in the following way. If it can be proven that an activity was integral to the culture of the aboriginal group, it is presumed to have formed an incident in the fiduciary burden assumed by the Crown, even in the absence of specific historical evidence to this effect.

C. *Exclusive and Non-Exclusive Rights*

Some aboriginal rights are *exclusive*. They give an aboriginal group the sole right to engage in certain activities, to use and occupy a tract of land, to exploit particular resources, and so on. The holders of the right are the only ones entitled to exercise it, and they can maintain the right against the entire world. For

example, where a group has aboriginal title to a certain tract of land, it generally has the sole right to occupy and use the land and exploit its resources.⁷⁵ No one outside the group is entitled to occupy the land, and the group has the right to expel trespassers. For most practical purposes, the aboriginal group “owns” the land.

Aboriginal title is perhaps the clearest example of an exclusive aboriginal right. However, it is not necessarily the only one. For example, an aboriginal group might have exclusive rights to certain songs and stories that are a central part of the group’s cultural heritage. Since the right is exclusive, persons outside the group would not be able to reproduce those songs and stories without the group’s permission. The group would have a kind of aboriginal “copyright” to them.

Other aboriginal rights are *non-exclusive*. While they give an aboriginal group the right to engage in certain activities — such as to use a tract of land or to exploit a resource — they do not give the group sole benefit of the right or the capacity to prevent others from exercising corresponding rights. Suppose, for example, that a certain group has an aboriginal right to hold potlaches as a central part of its cultural heritage; however, at common law, the general public are also free to hold potlaches if they want to. Here the group’s aboriginal right does not entitle it to prevent others from engaging in the same activity. It is a non-exclusive right.

What, then, is the legal status of a non-exclusive aboriginal right? Clearly it does not carry the same legal clout as an exclusive right. Nevertheless, in some contexts, a non-exclusive aboriginal right will have greater weight than a corresponding common law right. This difference flows from the distinctive origins and character of the aboriginal right. Aboriginal rights are governed by a unique fiduciary relationship between the Crown and aboriginal peoples.⁷⁶ Under this relationship, the Crown has the duty to protect the basic rights and interests of the aboriginal peoples. One effect of this duty is to restrain the hand of the Crown itself in its dealings with aboriginal peoples and their rights. So, legislation should generally be interpreted in a manner favourable to aboriginal and treaty rights. By contrast, rights held by the general public do not generally benefit from a similar rule of statutory interpretation.

Non-exclusive aboriginal rights may also furnish the policy basis for statutory differentiations between the rights of aboriginal peoples and those of the general public. For example, a non-exclusive aboriginal right to fish may provide the rationale for statutory provisions granting special fishing privileges to aboriginal peoples, beyond those held by the public. This sort of statutory differentiation may be shielded from Charter scrutiny by s. 25 of the *Constitution Act, 1982*, which provides that the Charter shall not be construed so as to

⁷⁵ Nevertheless, two or more aboriginal groups may hold overlapping aboriginal titles to the same tract of land; *Delgamuukw v. British Columbia*, *supra* note 52 at 1105-06.

⁷⁶ *R. v. Sparrow*, *supra* note 33 at 1107-10; *R. v. Van der Peet*, *supra* note 7 at 536-37.

derogate from the aboriginal, treaty and other rights held by the aboriginal peoples of Canada. Where a statute differentiates between an aboriginal group and the general public, it may be immune to challenge under the Charter if the purpose of the differentiation is protect aboriginal rights, even where those rights are non-exclusive in character.

In other cases, legislative provisions may give special protection to aboriginal or treaty rights on a global basis. For example, s. 88 of the *Indian Act* states that all provincial laws of general application are applicable to Indians, subject to "the terms of any treaty".⁷⁷ The effect of the latter qualification is to shield treaty rights (both exclusive and non-exclusive) from restrictions imposed by general provincial legislation – restrictions that would apply to comparable rights held by the general public. So, for example, a non-exclusive hunting right enshrined in a treaty would be protected from provincial legislation under s. 88. Of course, the prime instance of such protective legislation is s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms "existing aboriginal and treaty rights" and shelters them from governmental limitation and infringement.

D. *The Coexistence of Exclusive and Non-Exclusive Rights*

Some exclusive aboriginal rights, although in principle held against the whole world, may coexist with the exclusive rights of other parties. Conversely, some non-exclusive aboriginal rights may qualify the exclusive rights of other parties in unexpected ways. These complications merit a closer look.

In principle an exclusive right takes effect against the entire world. Nevertheless, in practice such a right sometimes overlaps with exclusive rights held by other parties. For example, where a group has an exclusive aboriginal right to pick berries in a certain area, in principle the only persons entitled to pick berries there are group members. Suppose however that the area encompasses a tract of land owned by a private individual. So long as the tract is not actually occupied by the owner in a manner that effectively precludes berry-picking, it seems that in some cases the aboriginal right may apply to the tract and co-exist with the private owner's rights.⁷⁸ Here the rights of the aboriginal group and the private owner are both exclusive; in principle they both take effect against the entire world. However, in practice the rights co-exist and overlap; neither operates to the complete exclusion of the other. In effect, both the aboriginal group and the private owner are entitled to pick berries in the tract. Again, consider a situation where two distinct indigenous groups have aboriginal rights to fish at the same location on a river bank. In each case, the aboriginal right is exclusive and holds good against the entire world. Since both rights are held in respect of the same fishing station, neither aboriginal group has the right to

⁷⁷ R.S.C. 1985, c. I-5.

⁷⁸ This result appears to follow from the ruling in *R. v. Badger*, *supra* note 41 at 790-809, discussed below.

prevent the other from fishing there. Here, the two groups have shared exclusive rights, which co-exist and overlap.⁷⁹

So far we have considered only exclusive rights. However, non-exclusive rights may also overlap with other rights. Consider the case where an aboriginal group holds a non-exclusive treaty right to hunt in an area that comprises some privately-owned land. This non-exclusive right may co-exist with the exclusive rights of the private owners, so long as the private land is not occupied in a manner that precludes the exercise of the hunting right. For example, in the *Badger* case,⁸⁰ the Supreme Court considered the effect of a clause in the *Natural Resources Transfer Agreement, 1930*, which provides that Indians have the right of hunting, trapping and fishing for food on unoccupied Crown lands and on any other lands to which they have a "right of access". The Court held that this provision should be read in the light of Treaty No. 8 of 1899, which undertakes that the Indian parties have the right to hunt, trap and fish throughout the territory surrendered in the Treaty, excepting such tracts taken up "for settlement, mining, lumbering, trading or other purposes". We may note that this right appears to be non-exclusive, in the sense that it does not preclude others from hunting in the same territory. The Court ruled that under these provisions the Indians were entitled to hunt on privately-owned land, so long as the lands were not put to visible use that was incompatible with hunting. In effect, a non-exclusive hunting right co-exists with the otherwise exclusive rights of private land-owners.

These distinctions are complicated by the fact that aboriginal rights and treaty rights — exclusive and non-exclusive alike — enjoy the protection of s. 35(1) of the *Constitution Act, 1982*. So, even where a non-exclusive aboriginal or treaty right replicates a common law right held by the general public, the aboriginal or treaty right will have the benefit of a constitutional shield not enjoyed by the common law right. For example, in the *Marshall* case,⁸¹ the Supreme Court considered a situation where a Mi'kmaq group held treaty rights to hunt, fish and trade that arguably replicated rights held by the general public at common law. Justice Binnie held that a general right enjoyed by all citizens could nevertheless be made the subject of an enforceable treaty promise. The effect of the treaty promise was not necessarily to confer *preferential* rights on the aboriginal parties. However, even if the treaty did not enhance the *content* of the rights, it affected the level of legal protection they enjoyed. Where a statute imposes restrictions on the exercise of the treaty rights, the restrictions will not take effect unless justified under s. 35(1), *Constitution Act, 1982*. Justice Binnie observed that the fact that the content of Mi'kmaq rights under the treaty was no greater than that enjoyed by the general public did not detract from the higher protection the treaty afforded the Mi'kmaq people under s. 35(1).

⁷⁹ The concept of "shared exclusivity" is discussed in *Delgamuukw v. British Columbia*, *supra* note 52 at 1105-06.

⁸⁰ *R. v. Badger*, *supra* note 41 at 790-809.

⁸¹ *R. v. Marshall*, *supra* note 40 at paras. 45-48.

By implication, the *Marshall* case supports the parallel proposition that the enactment of s. 35(1) did not normally convert non-exclusive rights into exclusive rights. Suppose that prior to 1982 a group had an aboriginal right to fish in a certain area. The right was non-exclusive and replicated the fishing rights of the general public at common law. Absent unusual circumstances, it seems that s. 35(1) would not transform this non-exclusive right into an exclusive one. After 1982, the general public would still be free to fish in the area at common law. Nevertheless, under s. 35(1), the aboriginal right would gain a measure of constitutional protection from statutory infringement that the common law right would not possess.

E. *Depletable and Non-Depletable Rights*

Aboriginal rights may also be classified as *depletable* and *non-depletable*. *Depletable rights* are rights whose exercise tends to use up some portion of a finite material resource — whether renewable (like fish and trees) or non-renewable (like minerals). By contrast, the exercise of *non-depletable rights* does not involve the consumption of a finite material resource. This distinction is a practical one, which does not pretend to absolute analytical rigour. Obviously, any human activity involves the use of certain finite resources (such as space and energy). So, in this broad sense, virtually every right has resource implications because certain amounts of space and energy are needed to exercise it. When we speak of depletable rights, we have something more specific in mind — rights whose resource implications significantly transcend the routine effects of human activity.

Where a depletable right is *non-exclusive*, the exercise of the right will obviously affect the amount of the resource available to other user-groups — whether temporarily or permanently. For example, if an aboriginal group exercises its non-exclusive right to fish in certain waters, its activities will diminish the stock of fish available that season for other users and may also have long-term effects on the stock's capacity to reproduce itself. Even where a depletable right is *exclusive*, it may affect the rights of others. For example, the exercise of an exclusive aboriginal right to fish in certain waters will often affect the rights of user-groups in other waters, since fish are a mobile resource and migrate from area to area.

By contrast, non-depletable rights do not have significant resource implications. The right to speak an aboriginal language is a good example. When members of the Cree nation exercise their right to speak their ancestral tongue, they do not lessen the capacity of non-Cree people to speak the language. Rather, by keeping their language alive and flourishing, native Cree speakers enhance the opportunity of outsiders to learn and enjoy the language. In other words, when people speak their mother tongue, they do not make “withdrawals” from a finite account in a language bank. They contribute to the language bank and enrich its resources — which in principle are available to the entire world.

Depletable rights may be further sub-divided into *limited* and *unlimited* rights. *Limited* depletable rights have built-in legal restrictions that help to conserve the material resource or to safeguard the rights of other user-groups. In some cases, the scope of the right may be determined by the *amount of the resource* available at any given time. For example, a group might have the aboriginal right to fish in a certain area, subject to a built-in limit that ensures that enough fish remain for the stock to reproduce itself. In other cases, the scope of the right may be limited internally by the *purpose* that it serves — such as a right to fish for food, social and ceremonial purposes but not for commercial purposes,⁸² or the right to trade the products of fishing and hunting so as to support a “moderate livelihood” but not the “accumulation of wealth.”⁸³

By contrast, *unlimited* depletable rights do not have built-in legal restrictions and so in principle may be exercised so as to exhaust the material resource in question. So, for example, an aboriginal group might have the exclusive right to exploit a mineral resource found on certain lands. Here the right could well be unlimited, in that it does not prevent the entire mineral resource from being used up. Of course, the fact that an aboriginal or treaty right is unlimited as a matter of internal definition does not necessarily prevent it from being regulated by aboriginal governments or by public legislation that satisfies the standards laid down under s. 35(1), *Constitution Act, 1982*.

The main significance of the distinction between depletable and non-depletable rights lies in the constitutional arena. The entrenchment of aboriginal and treaty rights in s. 35(1) has greater implications for depletable rights than non-depletable rights, because it may affect the distribution of the resource among the various user-groups. By contrast, the entrenchment of a non-depletable right does not have this effect, because the exercise of such a right does not diminish the capacity of others to exercise equivalent rights. So, in applying s. 35(1), there is good reason to distinguish between depletable and non-depletable rights and to apply different standards to them.

Conclusion

We have argued that the foundations of aboriginal and treaty rights lie in the common law doctrine of aboriginal rights, which originated in ancient inter-societal custom generated by interaction between the Crown and indigenous peoples, as informed by basic principles of justice. This *sui generis* doctrine is part of the common law of Canada and operates uniformly across the country; it also provides the context for interpreting section 35(1) of the *Constitution Act, 1982*. The doctrine of aboriginal rights has a number of distinct branches. One branch governs treaties between indigenous peoples and the Crown, and determines their basic status, existence, interpretation and effects. Another

⁸² See *R. v. Sparrow*, *supra* note 33 at 1099-1101.

⁸³ *R. v. Marshall*, *supra* note 40 at paras. 57-61.

branch deals with the various types of aboriginal rights, including aboriginal title and the right of self-government. So doing, the doctrine distinguishes between generic and specific rights, exclusive and non-exclusive rights, and depletable and non-depletable rights. Still other branches of the doctrine articulate the principles governing the operation of aboriginal customary law and the fiduciary role of the Crown. In brief, the common law doctrine of aboriginal rights provides the basic frame within which particular aboriginal and treaty rights may be identified. It is our *mappamundi*.